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OFFICE OF PETITIONS

In re Application of :
Hilfinger et al. : CORRECTED
Application No. 10/706,738 : DECISION GRANTING PETITION
Filed: 12 November, 2003 :
Attorney Docket No. TSR-10002/38 :

This is a corrected decision on the petition filed on 12 April, 2004, requesting that the above-identified application be accorded a filing date of 12 November, 2003.

On 12 November, 2003, the application was deposited.

On 16 June, 2004, Initial Patent Examination Division mailed a Notice of Incomplete Nonprovisional Application, stating that the application had not been assigned a filing date because the specification did not include at least one (1) claim. A two (2) month period for reply was set. The Notice stated that the filing date will be the date of receipt of the specification, including at least one claim. The Notice also stated that Pages 13-32 of the specification (description and claims) appeared to have been omitted from the application.

On 12 April, 2004, the present petition and a check for the requisite petition fee were filed. Petitioners have provided an itemized postcard receipt, and also argue that a complete application was filed on 12 November, 2003. Petitioner has provided a declaration by counsel's legal assistant, Janice R. Kuehn, stating that she counts all of the pages of applications before the applications are deposited with the USPTO.

The argument and evidence presented are not persuasive. Petitioners' declaration was made five months after the events in question and recites Ms. Kuehn's recall of the preparation and filing of the application with the USPTO. The application does not appear to be unusual and it is not understood why the filing

of this particular application would stand out in such detail in Ms. Kuehn's memory, particularly in view of the fact that Ms. Kuehn prepared and mailed similar papers to the PTO on a routine, daily basis.

The Office file is the official record of the papers originally filed in this application. Where the records of the Office (e.g., the file of the application) contain any document(s) or fee(s) corresponding to the contents of the correspondence at issue, the Office will rely upon its official record of the contents of such correspondence in the absence of convincing evidence (e.g. a postcard receipt under MPEP 503 containing specific itemization of the document(s) or fee(s) purported to have been filed with the correspondence at issue) that the Office received and misplaced any document(s) or fee(s) that is not among the official records of the Office.

A review of the record reveals that no pages 13-32 of specification and claims are located among the application papers received on 12 November, 2003. Additionally, petitioners may not rely on the return postcard with regards to the missing pages of claims, ~~because the postcard reflects that the USPTO did not~~ receive five (5) pages of claims. If a postcard receipt has been annotated to indicate that a particular item denoted on the postcard was not received by the USPTO, the postcard receipt will not serve as *prima facie* evidence of receipt of that item in the USPTO.¹ Therefore, petitioners' postcard receipt does not show receipt of five pages of claims in the USPTO on 12 November, 2003. However, as the postcard is not annotated with regard to the written description, petitioners may rely upon the postcard to show that Pages 13-27 of the written description were lost after receipt in the USPTO.

Nevertheless, petitioners state that the entire disclosure of the prior provisional application is "incorporated herein by reference." Petitioner requests that the application be accorded a filing date of 12 November, 2003, and that the petition fee be refunded. The petition is accompanied by, *inter alia*, 27 pages of written description, five (5) pages containing 25 claims, and one page of abstract, as well as a copy of the prior provisional application, which contained, *inter alia*, two (2) pages containing seven (7) claims. Furthermore, the petition states that a copy of the prior provisional application is included herewith.

¹MPEP 503.

A review of the official file reveals that the first page of specification, deposited on 12 November, 2003, states that this application claims priority of provisional application No. 60/425,379 "which is incorporated herein by reference." In view of the incorporation by reference of the provisional application contained in the specification, the Office may, on petition, accept a copy of the claims of the provisional application at a later date and accord this application a filing date of 12 November, 2003.


The petition is granted.

The application will be processed using Pages 13 to 27 of the specification supplied on 12 April, 2004, and the two pages containing Claims 1-7 from provisional Application No. 60/425,379. The other application papers filed on 12 April, 2004, will not be used for processing or examination, but will be retained in the application file.

The petition fee will not be refunded since special handling of this application was necessitated by the condition of the application as filed, wherein the application, as filed, did not include any claims.

The application is being forwarded to OIPE for further processing with a filing date of 12 November, 2003, using the application papers filed on that date, the copy of pages 13-27 of the specification supplied with the present petition, and the two (2) pages containing seven (7) claims from the prior provisional application supplied with the petition.

Telephone inquiries should be directed to the undersigned at 571-272-3231.


Douglas I. Wood
Senior Petitions Attorney
Office of Petitions

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